

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BEN A. BOBBETT)	
Claimant)	
VS.)	
)	Docket No. 200,888
TOPEKA PUBLIC SCHOOLS)	
UNIFIED SCHOOL DISTRICT 501,)	
Respondent)	
Self-Insured)	
)	
AND)	
)	
AMERICAN HOME LIFE)	
INSURANCE COMPANY)	
Respondent)	
)	
AND)	
)	
CINCINNATI INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

U.S.D. 501 appealed the Order of Dismissal dated September 5, 1997, entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on February 25, 1998.

APPEARANCES

Gregory J. Bien of Topeka, Kansas, appeared for U.S.D. 501. Anton C. Andersen of Lenexa, Kansas, appeared for American Home Life Insurance Co. and Cincinnati Insurance Company.

RECORD AND STIPULATIONS

The record consists of the pleadings and documents compiled to date by the State Division of Workers Compensation.

ISSUES

U.S.D. 501 settled a workers compensation claim with Ben A. Bobbett. The school district then filed an Application for Hearing with the State Division of Workers Compensation for the sole purpose of seeking reimbursement or contribution from American Home Life, whom the school district alleges was partially responsible for Mr. Bobbett's injuries.

American Home Life and Cincinnati Insurance Company filed a motion to dismiss the claim asserted against them by the school district. The school district filed this appeal after Judge Benedict granted the motion.

The school district contends that Mr. Bobbett developed bilateral carpal tunnel syndrome as the result of simultaneously working for both the school district and American Home Life. The school district also contends that under either K.S.A. 44-503a, the multiple employment statute, or the doctrine of legal subrogation, American Home Life should reimburse it for a portion of the monies it has paid either to Mr. Bobbett or upon his behalf for the work-related injury.

American Home Life and its insurance carrier contend that: (1) the school district must pursue its claim for contribution in the civil action that is presently pending before the Court of Appeals, if any such cause of action exists; (2) there can be no right to contribution where Mr. Bobbett did not assert claims against both alleged employers; (3) if any right to contribution exists, it was either extinguished or waived when the school district settled with Mr. Bobbett; and, (4) any right to contribution is time-barred because Mr. Bobbett did not serve timely written claim upon American Home Life and, in addition, failed to file a timely Application for Hearing.

Simply stated, the issue now before the Appeals Board is:

When an employer settles a workers compensation claim with an employee who allegedly sustained injury as a result of the work performed for two employers, can the employer that entered into the settlement agreement seek contribution from the other alleged employer despite the fact that the employee never claimed benefits from that other alleged employer and the employee also failed to file a timely application for hearing?

FINDINGS OF FACT

After reviewing the entire record compiled to date, the Appeals Board finds:

- (1) Mr. Bobbett worked for U.S.D. 501 as a custodian.
- (2) On January 11, 1994, the school district's workers compensation administrator wrote American Home Life requesting contribution in providing medical treatment to Mr. Bobbett for his work-related injury. American Home immediately responded by letter dated January 13, 1994, and advised that Mr. Bobbett was an independent contractor and not an employee of the company.

(3) On June 6, 1995, U.S.D. 501's attorney and Mr. Bobbett appeared before a Special Administrative Law Judge and settled a workers compensation claim for a July 26, 1993, accident that involved both upper extremities.

(4) In December 1995, U.S.D. 501 filed a Petition for Declaratory Judgment in Shawnee County, Kansas. In that suit, the school district requested contribution from American Home Life and its workers compensation insurance carrier for monies it had paid to Mr. Bobbett or upon his behalf in the workers compensation claim.

(5) By Memorandum Decision and Order dated January 16, 1997, the District Court Judge granted American Home Life's Motion for Summary Judgment. In disposing of the declaratory judgment action, the Honorable Mathew J. Dowd ruled in part:

In the case at bar, Mr. Bobbett never filed a workers compensation claim against American Home Life. When U.S.D. 501 failed to defend against the claim based upon apportionment to another employer, American Home Life, before the workers compensation judge and then settled all of Mr. Bobbett's work-related claims, it settled any potential claims against the Defendants and waived the defense of comparative liability. Accordingly, summary judgment must be granted in favor of Defendants American Home Life and Cincinnati Insurance Company as a matter of law.

(6) The school district appealed the District Court's decision and that case is presently pending before the Court of Appeals.

(7) On May 14, 1997, an Application for Hearing was filed with the State Division of Workers Compensation. It is through this application that U.S.D. 501 seeks contribution from American Home Life Insurance Company under the theory that the school district paid workers compensation benefits to Mr. Bobbett that were American Home's responsibility. The application was signed by Mr. Bobbett and the school district's attorney.

(8) The school district contends it is entitled to contribution because Mr. Bobbett's injuries were allegedly caused by his simultaneously working for both U.S.D. 501 and American Home Life as a custodian. The school district now seeks the same relief in this workers compensation proceeding as it seeks in the pending civil action.

(9) Mr. Bobbett did not serve a written claim for benefits upon American Home Life or its workers compensation insurance carrier.

(10) Neither American Home Life nor its insurance carrier paid monies to either Mr. Bobbett or others on his behalf that represented workers compensation benefits for the injury in question.

CONCLUSIONS OF LAW

(1) Under certain circumstances, the Workers Compensation Act apportions liability among multiple employers. The multiple employment statute, K.S.A. 44-503a, reads:

Whenever an employee is engaged in multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two (2) or more employers, and such employee sustains an injury by accident which arose out of and in the course of the multiple employment with all such employers, and which did not clearly arise out of and in the course of employment with any particular employer, all such employers shall be liable to pay a proportionate amount of the compensation payable under the workmen's compensation act as follows: Each such employer shall be liable for such proportion of the total amount of compensation which is required to be paid by all such employers, as the average gross weekly wages paid to the employee by such employer, bears to the total average gross weekly wages paid to the employee by all such employers, determined as provided in subsection (b)(7) of K.S.A. 44-511, as amended.

(2) The multiple employment statute does not require an employer to pay more than its proportionate share of benefits due. And the statute does not create a right in an employer, who voluntarily pays more than its proportionate share, to proceed in a workers compensation proceeding against another alleged employer to obtain reimbursement or contribution. Should an overpayment in a multiple employment situation create a right of subrogation or contribution, the proper avenue to enforce that right is a civil action. Therefore, Judge Benedict properly dismissed this proceeding.

(3) The Appeals Board agrees with the analysis and conclusion of the Honorable Mathew J. Dowd. U.S.D. 501 failed to defend Mr. Bobbett's claim by raising the issue of multiple employment or apportionment. After settling the claim, the school district cannot now seek contribution from American Home Life.

(4) The Workers Compensation Act requires a worker to serve written claim for benefits upon an employer within either 200 days of the date of accident or the date of last payment of compensation.¹ As indicated above, Mr. Bobbett never served a claim for benefits on American Home Life. The January 1994 letter that the school district sent to American Home Life requesting contribution, under these circumstances, is not a claim for workers compensation benefits submitted upon Mr. Bobbett's behalf. Because of the failure to serve timely written claim upon American Home Life, any claim that Mr. Bobbett may have had against that company is not enforceable.

(5) No proceeding for compensation shall be maintained under the Workers Compensation Act unless an Application for Hearing is filed with the Division of Workers Compensation within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.² As indicated above, neither American Home Life nor its insurance carrier paid workers compensation benefits for the injury in question. Therefore, Mr. Bobbett, American Home Life, and its insurance carrier

¹K.S.A. 44-520a.

²K.S.A. 44-534(b).

had three years from the July 26, 1993, date of accident to file the Application for Hearing with the Division of Workers Compensation. Accordingly, the Application for Hearing filed in May 1997 was not timely and any claim that Mr. Bobbett had against American Home Life must fail for this reason also.

(6) Based upon the above conclusions, should U.S.D. 501 have a right to seek either reimbursement or contribution in a workers compensation proceeding from another alleged employer in a multiple employment situation, a right which the Appeals Board finds does not exist in the first instance, such right would be derivative to Mr. Bobbett's rights to receive compensation. Therefore, the school district's claim against American Home Life must fail for the following reasons:

- (1) No such right of contribution exists under the Workers Compensation Act;
- (2) The lack of timely written claim upon American Home Life;
- (3) The lack of timely Application for Hearing filed with the Director's office;
- (4) The right of contribution was waived; and,
- (5) Any right of contribution must be pursued in a civil action and not in a workers compensation proceeding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order for Dismissal dated September 5, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory J. Bien, Topeka, KS
Anton C. Andersen, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director